No. 03-8661

In The
Supreme Court of the United States

MELVIN T. SMITH,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Writ Of Certiorari To The Appeals Court Of The Commonwealth Of Massachusetts

BRIEF FOR PETITIONER

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QUESTION PRESENTED

At the close of the prosecution's case, the trial judge found that the prosecutor failed to provide even "a scintilla of evidence" on an essential element of the charged crime and issued a written order finding the defendant "not guilty." The question presented is whether the trial judge's decision to vacate that order at the close of the defendant's case on the remaining charges and submit the resurrected charge to the jury violated the Fifth Amendment prohibition against double jeopardy?

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The order of the Massachusetts Superior Court granting Petitioner's motion for a required finding of "not guilty" of the offense charged and its subsequent order reconsidering and vacating the finding of "not guilty" are unpublished.[1] The opinion of the Superior Court denying Smith's motion for relief from unlawful restraint is unpublished.[2] The opinion of the Massachusetts Appeals Court affirming Smith's conviction is reported at 58 Mass. App. Ct. 166, 788 N.E.2d 977 (2003). The order of the Massachusetts Supreme Judicial Court denying further appellate review is reported at 440 Mass. 1104, 797 N.E.2d 380 (2003).

STATEMENT OF JURISDICTION

The order of the Massachusetts Supreme Judicial Court denying further appellate review was issued on October 3, 2003. 440 Mass. 1104, 797 N.E.2d 380. The petition for writ of certiorari was filed on December 31, 2003. The petition was granted on June 14, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in part:

[1] J.A. 3, 21-22, 71-76; (Endorsed Motion for Required Finding of Not Guilty).

[2] J.A. 106-111.

"nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb. . . . "

2. Massachusetts General Laws, Chapter 269, § 10 provides, in part:

"(a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; . . .

. . . shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than one year nor more than two and one-half years in a jail or house of correction . . . ."

3. Massachusetts General Laws, Chapter 140, § 121 provides, in part:

"As used in sections 122 to 131P, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:

* * *

'Firearm', a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 16

inches or 18 inches in the case of a shotgun as originally manufactured."

4. Massachusetts Rule of Criminal Procedure 25 provides, in part:

"Motion For Required Finding Of Not Guilty

(a) Entry by Court. The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time. If the motion is denied or allowed only in part by the judge, the defendant may offer evidence in his defense without having reserved that right."

STATEMENT OF THE CASE

A. Factual background.

Below, Smith sets out the facts with an eye to the specific issues presented on certiorari. (The factual background is set out more fully in the opinion of the Massachusetts Appeals Court.)[3]

The Commonwealth of Massachusetts brought indictments against Petitioner Melvin Smith for unlawful

[3] J.A. 121-123.

possession of a firearm (fourth offense), assault and battery with a dangerous weapon, and armed assault with intent to murder.[4] Tracking Massachusetts law, the firearm indictment charged that Smith "did unlawfully, knowingly have in his possession, a firearm, to wit: a handgun, from which a bullet could be discharged, *the length of the barrel of said firearm being less than sixteen inches*".[5] Codefendant Felicia Brown was charged as an accessory after the fact.[6]

The case proceeded to trial, the jury was sworn, and the Commonwealth put on its case. The government presented evidence tending to show that on August 16, 1996, Christopher Robinson was shot three times and seriously injured.[7] The shooting was alleged to have taken place at 33 Lawn Street in Boston, the home of Robinson's aunt Patricia Brown and his cousin Felicia Brown.[8]

Melvin Smith stayed at 33 Lawn Street during the week prior to the shooting.[9] Smith and Robinson saw each other at 33 Lawn Street several times during that week.[10] Most of the time, Smith "basically" just stayed in Felicia's room.[11] According to Robinson, Smith was

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[4] J.A. 121.

[5] J.A. 9 (emphasis added).

[6] J.A. 121.

[7] J.A. 12-13, 122.

[8] (Tr. 2:64-69); Portions of the trial transcript not included in the Joint Appendix will be cited, by volume and page, as "(Tr. [volume]:[page])."

[9] (Tr. 3:42).

[10] J.A. 16.

[11] (Tr. 3:56).

Felicia's boyfriend.[12] Prior to that evening, Smith had brought Heineken beer to 33 Lawn Street for Robinson to share and, at least once, gave Robinson a ride to the grocery store.[13]

Robinson testified that, on the night of the shooting, he descended from the third to the second floor.[14] As he reached the second floor, he saw Melvin Smith, gun in hand, standing in Felicia's room at the foot of her bed.[15] Robinson described the gun in question as a "pistol. It appeared to be a .32 or a .38."[16] Robinson believed the weapon involved was a .32 or .38 revolver based on his familiarity with handguns; his father owned "several" handguns.[17] Robinson testified that Smith shot him three times and that Smith and Brown then left the house.[18] At the time of the shooting, Robinson's blood alcohol level was at least .252,[19] Robinson having consumed vodka and beer nearly all day.[20] He also ingested marijuana and crack cocaine earlier that evening.[21]

At trial, the principal theory of the defense was that Robinson was too intoxicated to identify his assailant correctly and that one of the tenants in the house, Patrick

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[12] (Tr. 3:54).

[13] (Tr. 3:33-34).

[14] J.A. 11.

[15] J.A. 11; (Tr. 2:70).

[16] J.A. 12.

[17] J.A. 13-14.

[18] J.A. 12-13.

[19] (Tr. 2:35); (Tr. 6:41).

[20] (Tr. 2:57, 58, 61, 117, 161, 173); (Tr. 3:49).

[21] (Tr. 2:117, 137); (Tr. 6:49, 53).

Verdieu, had both a motive and an opportunity to shoot him.[22]

B. Facts relating to the double jeopardy violation.

1. Pre-acquittal proceedings.

On November 12, 1998, the sixth day of trial, the Commonwealth closed its case.[23] After the Commonwealth rested, Smith moved for a "required finding of not guilty" on the charge of unlawful possession of a firearm[24] pursuant to Massachusetts Rule of Criminal Procedure 25.[25] The motion noted that the Commonwealth had "not presented any evidence that the barrel of the firearm used in this case was less than sixteen inches, a necessary element of the crime."[26]

The trial judge agreed that there was "not a scintilla of evidence on" the length of the barrel and granted the motion.[27] The following colloquy preceded the court's entry of its order finding Smith not guilty:

> THE COURT: Do you rest?
>
> MR. PULEO [THE PROSECUTOR]: Yes.
>
> * * *
>
> THE COURT: Do you people have, now that Mr. Puleo has finished with all his evidence and now

[22] J.A. 28-31, 38-40, 123.

[23] J.A. 19, 122.

[24] J.A. 22.

[25] J.A. 123.

[26] J.A. 98.

[27] J.A. 3, 21, 22.

he's rested, and we'll do it formally in front of the jury, but do you people have anything that –

MR. CARROLL [SMITH'S COUNSEL]: I do. I'd like to bring it up.

* * *

THE COURT: Mr. Puleo, with respect to Mr. Smith's motion for a required finding of not guilty on the firearm charge, possession of a firearm, do you wish to address that? . . . [P]art one deals with the portion of the statute wherein you have to prove the length of the barrel.

MR. PULEO: I think Mr. Robinson's testimony about the description of the gun was, variously, a handgun or a pistol. Mr. Robinson testified that he was familiar with guns because of his father's experience – I don't know if it was in the military, or what it was. And while Mr. Robinson was not asked a direct question about the length of the barrel, I think that those terms as used by Mr. Robinson, given his level of familiarity, if not quasi-expertise of handgun and pistol, satisfy –

THE COURT: Well, it's the jury that has to make the finding of fact that you've established that, not based upon what Mr. Robinson says is a pistol or a handgun. I mean, the jury has to make a finding.

MR. PULEO: And I think this jury, viewing this evidence in the light most favorable to the Commonwealth, would be warranted in finding that the –

THE COURT: *How can they find the length of the barrel? . . . There's not a scintilla of evidence on that.*

MR. PULEO: Because Mr. Robinson's testimony that it was a pistol, I think he even said a small pistol, or a handgun, allows for a reasonable inference that the barrel of a pistol or a handgun is not longer than [sixteen] inches.

* * *

THE COURT: No, I don't think that there is a basis in which a jury, based upon Mr. Robinson's testimony alone, can conclude that a pistol or a revolver has a barrel length of sixteen inches or less.

MR. PULEO: Well, given that, if that's the Court's interpretation of Mr. Robinson's testimony, then *I will be requesting to reopen and allow Mr. Robinson to testify to that.*

THE COURT: Well, this is the time in which they are moving for a required finding of not guilty. *I'm going to allow it on the firearm charge.*

MR. CARROLL: Your Honor, as to the other two charges, I would argue –

THE COURT: I'm going to deny it with respect to the other two. And I'm going to deny Ms. Brown's with respect to an accessory.

(End of side-bar conference.)

THE COURT: Mr. Puleo, any further evidence from the Commonwealth?

MR. PULEO: No. At this point, the Commonwealth rests their case.[28]

[28] J.A. 18-22 (emphasis added).

The trial judge then entered a written order on Petitioner's motion for a finding of not guilty as follows: "11/12/98 – Filed and after hearing, Allowed. Donovan, J. Attest: Marybeth Brady Assistant Clerk."[29] In addition, the court's order finding Smith not guilty on the firearm possession count was entered on the official docket, which reflected "11/12/98 Motion [for a required finding of not guilty] allowed after hearing."[30]

2. Post acquittal proceedings.

With the firearm charge out of the case, Smith and codefendant Felicia Brown presented their respective cases through the testimony of Patricia Brown, rested, moved for required findings of not guilty on the remaining charges, and then argued their requests for jury instructions on the remaining charges.[31] Following the conference on jury instructions, the judge announced that there would be a "15-minute recess now then we'll have final arguments."[32] But when counsel returned to the courtroom to make Smith's closing argument, the landscape dramatically changed. The judge announced, during the recess, that she had reviewed a then twenty-one-year-old case from the Massachusetts Supreme Judicial Court newly provided to her by the prosecutor.[33] Based on that case, the judge now took the view that the jury could "infer the

[29] (Endorsed Motion for Required Finding of Not Guilty).

[30] J.A. 3.

[31] J.A. 22-71.

[32] J.A. 71.

[33] J.A. 71 (*citing Commonwealth v. Sperrazza*, 372 Mass. 667, 363 N.E.2d 673 (1977)).

length of [the barrel of the gun] based on the type of instrument" it was.[34] After another colloquy between the judge and defense counsel regarding the sufficiency of the evidence, the prosecutor proposed the following:

> MR. PULEO: . . . *What I would request, though, rather than research on what I think is a legitimate question, at least to these three, though they have differing ideas of what the controlling law was, if the Court allows me to take the count to the jury and then certainly if the jury comes back not guilty, it's moot*. But if they do come back guilty and the Court is of the mind that that charge should not have gone to the jury, under Rule 25, of course, the Court still –
>
> THE COURT: Uh-huh. I can always set it aside.
>
> * * *
>
> THE COURT: I think that's the way we'll do it. Let it go to the jury.[35]

But defense counsel protested that he had additional arguments to make:

> MR. CARROLL: On my motion for a required finding on the handgun, in addition to the barrel length –
>
> THE COURT: Yes, *I'm reversing that.*
>
> MR. CARROLL: *In addition to arguing the length, there were other grounds within the motion asking the Court to direct that particular*

[34] J.A. 72.

[35] J.A. 74 (emphasis added).

> *finding be not guilty. I would like to argue those issues and –*
>
> THE COURT: *No. I'm going to deny it at this point*, your motion for a required finding of not guilty on the gun charge.
>
> MR. CARROLL: *Well, I just want to make sure the Court, and that it's on the record, that part of the motion is that –*
>
> THE COURT: *The motion has already been ruled on in this case.*
>
> MR. CARROLL: – the only evidence as to where Mr. Smith was staying at the time of the shooting is the statement of Christopher Robinson that Mr. Smith was, in fact, staying at – had been staying at their – at 33 Lawn Street for the same amount [of] time that Mr. Robinson had, for a week preceding the shooting.
>
> THE COURT: I understand.
>
> MR. CARROLL: That's the residence –
>
> THE COURT: I understand, and I'm denying it.
>
> MR. CARROLL: And also, I've also argued by analogy the Castle statute, that he's there as a legitimate guest, at worst.
>
> THE COURT: Yes, Thank you.[36]

Thus rebuffed in his attempts to fully address the issue of sufficiency of the evidence as to the firearm charge, the case proceeded on to closing arguments and instructions to

[36] J.A. 75-76 (emphasis added).

the jury.[37] While the jury deliberated, the parties continued to argue the question of sufficiency as to the firearm charge and the court took the issue under advisement.[38] At the close of jury deliberations, Smith was convicted of unlawful possession of a firearm, assault and battery with a dangerous weapon and armed assault with intent to murder.[39] (The jury acquitted Brown.)[40]

Immediately following the jury's verdict, the court proceeded to a jury-waived trial on that portion of the firearm indictment that charged Smith with a fourth offense (carrying an enhanced mandatory minimum sentence, restrictions on parole eligibility, and restrictions on deductions from the sentence for good conduct.)[41] Smith renewed his motion for required finding of not guilty at the close of the government's evidence on the subsequent offender portion of the trial.[42] The trial judge denied the motion, Smith rested, and the judge convicted Smith of a fourth offense of unlawful possession of a firearm.[43] Smith was then sentenced to concurrent terms of ten to twelve years on the firearm charge, nine to ten years on the assault and battery by means of a dangerous weapon charge, and twelve to fifteen years on the assault with intent to murder charge.[44] Smith appealed.

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[37] J.A. 76-77.

[38] J.A. 80-90.

[39] J.A. 93-95.

[40] J.A. 95.

[41] (Tr. 8:17, 19-24).

[42] (Tr. 8:78-79).

[43] J.A. 96; M.G.L. c. 269, § 10(d).

[44] J.A. 96-97.

3. Post-conviction proceedings.

With his direct appeal pending in the Massachusetts Appeals Court, Smith filed a "Motion for Relief from Unlawful Restraint"[45] in the trial court seeking to set aside his firearm conviction on double jeopardy grounds.[46] Although the trial judge denied the motion, she acknowledged that "the court allowed Smith's motion for a required finding of not guilty on the firearm charge" and only withdrew the allowance *after* Smith rested his case.[47] But in the trial judge's view, the withdrawal of the finding of not guilty did not violate the Double Jeopardy Clause because "Smith was convicted by the same jury that first heard the evidence against him, and no second jury was needed."[48]

Smith appealed.[49] But, like the trial judge, the Massachusetts Appeals Court held that "double jeopardy protections were not violated in these circumstances because the judge's correction of her ruling did not require a second proceeding."[50]

He then sought review before the Massachusetts Supreme Judicial Court, which declined further review.[51] On June 14, 2004, this Court granted Petitioner's petition for a writ of certiorari.

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[45] Mass. R. Crim. P. 30(a).

[46] J.A. 107-108.

[47] J.A. 107.

[48] J.A. 110-111.

[49] J.A. 121.

[50] J.A. 125.

[51] *Commonwealth v. Smith*, 440 Mass. 1104, 797 N.E.2d 380 (2003).

SUMMARY OF ARGUMENT

The prohibition against further prosecution after acquittal constitutes the primary and most cherished protection contained in the Double Jeopardy Clause.[52] Here, the trial judge acquitted Smith of illegally possessing a firearm, finding that government presented "not a scintilla" of evidence on an essential element of the charge against him. She unequivocally entered a judgment – reflected in a signed order and entered on the official docket – of "not guilty." But after Smith presented his case and argued his requests for jury instructions on the remaining charges, the prosecutor convinced the judge to "reverse" Smith's acquittal on the firearm charge. Thus, the judge allowed the prosecutor to see if he could do better a second time in convincing a second factfinder, the jury, of Smith's guilt.

The Double Jeopardy Clause barred the judge's "reversal" of Smith's acquittal. The government violates the Double Jeopardy Clause when jeopardy has attached, the defendant is acquitted, and the government then subjects that defendant to "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the facts charged."[53] Where the first factual resolution of the case results in acquittal, jeopardy conclusively terminates and the Double Jeopardy Clause bars further proceedings.

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[52] *Green v. United States*, 355 U.S. 184, 200 (1957); 4 W. Blackstone, Commentaries on the Laws of England 329, 355 (1769).

[53] *Smalis v. Pennsylvania*, 476 U.S. 140, 146 (1986) (*quoting United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977)).

Here, the prosecution against Smith satisfied each of these clear guideposts and, as such, violated the Double Jeopardy Clause. First, jeopardy attached when the jury was empanelled and sworn.[54] Second, jeopardy terminated when the court entered an order finding Smith "not guilty" of the crime with which he was charged; as this Court observed in *Smalis v. Pennsylvania*, "[a]cquittals . . . terminate the initial jeopardy."[55] Third, withdrawal of Smith's acquittal and submission of the resurrected charge to the jury indisputably subjected Smith to "further proceedings . . . devoted to the resolution of factual issues."[56]

Finally, the lower courts contravened this Court's settled precedent by considering whether the double jeopardy violation prejudiced Smith. This Court has repeatedly held that the Constitution "*conclusively presumes*" unfairness when the government places a defendant twice in jeopardy.[57]

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[54] *Crist v. Bretz*, 437 U.S. 28, 37-38 (1978).

[55] *Smalis*, 476 U.S. at 145 (*quoting Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308 (1984)).

[56] *Martin Linen*, 430 U.S. at 570.

[57] *Swisher v. Brady*, 438 U.S. 204, 214 (1978) (emphasis added, *quoting Arizona v. Washington*, 434 U.S. 497, 503-505 (1978)); *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980).

ARGUMENT

I. The trial judge unequivocally granted Smith's motion for acquittal at the close of the government's case on one of three charges. After Smith presented his defense and requested jury instructions on the remaining charges, the judge "reversed" her acquittal of Smith. But the Constitution grants Smith protection against being prosecuted for a crime where a competent tribunal previously acquitted him of that crime on the merits. Judgment must enter for Smith.

A. Jeopardy attached at the swearing-in of the jury.

This Court has established jeopardy attaches in a jury trial when the jury is empanelled and sworn.[58] Here, the jury was sworn on November 4, 1998.[59] Smith then participated in six days of trial before the jury, while the prosecutor put on the entire government case and then rested.[60] Plainly, the trial subjected Smith "to the hazards of trial and possible conviction."[61] Accordingly, jeopardy attached.

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[58] *Bretz*, 437 U.S. at 37-38.

[59] J.A. 2.

[60] J.A. 19, 22.

[61] *Serfass v. United States*, 420 U.S. 377, 391 (1975) (*quoting Green*, 355 U.S. at 187).

B. Jeopardy terminated when the judge unequivocally ordered Smith's acquittal orally, in writing, and in attested docket entries.

1. A judgment of acquittal terminates jeopardy.

The Double Jeopardy Clause bars the continuation of proceedings following the termination of jeopardy. Jeopardy terminates in an "acquittal," defined broadly as any "ruling" by a trial court that "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[62] This principle is not one of recent invention. The Court has consistently reaffirmed it in an unbroken line of cases stretching back more than a century, such that the absolute finality accorded to an acquittal by the Double Jeopardy Clause has become "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence."[63]

The trial judge's allowance of Smith's motion for a required finding of not guilty represented a final acquittal that terminated jeopardy as to the firearm charge. The trial judge both possessed and exercised the power to acquit Smith given to her by both Massachusetts common law[64] and Rule 25(a) of the Massachusetts Rules of Criminal Procedure. That rule provides:

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[62] *Lee v. United States*, 432 U.S. 23, 30 n.8 (1977) (*quoting Martin Linen*, 430 U.S. at 571).

[63] *Martin Linen*, 430 U.S. at 571 (*quoting United States v. Ball*, 163 U.S. 662, 671 (1896)).

[64] *Commonwealth v. Merrill*, 80 Mass. (14 Gray) 415, 418 (1860); *Commonwealth v. Lowder*, 432 Mass. 92, 96-97 (2000); *contrast Brady*, 438 U.S. at 216.

> The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time.

By using the imperative "shall", Rule 25 gives the trial judge not only the power to acquit but also the *duty* to acquit where the government's evidence is insufficient.[65]

All of the Massachusetts courts agreed that the judge allowed Smith's Rule 25 motion for a required finding of not guilty at the close of the government's case.[66] But none of the Massachusetts courts acknowledged that jeopardy terminated upon that acquittal.[67] This Court's jurisprudence, however, is consistent and clear: jeopardy terminates upon an order of acquittal based upon the insufficiency of the evidence.[68]

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[65] *See* Mass. R. Crim. P. 25(a) (reporters notes).

[66] J.A. 107, 123.

[67] J.A. 107-111, 124-125.

[68] *Martin Linen*, 430 U.S. at 572; *Smalis*, 476 U.S. at 144; *Richardson v. United States*, 468 U.S. 317, 325 n.5 (1984); *Hudson v. Louisiana*, 450 U.S. 40, 44-45 n.5 (1981); *United States v. Scott*, 437 U.S. 82, 91 (1978); *Sanabria v. United States*, 437 U.S. 54, 64 & n.18 (1978); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962).

2. The judge's acquittal of Smith represented a resolution of some or all of the factual elements of the offense.

The trial judge's order acquitting Smith "whatever its label, actually represents a resolution, *correct or not*, of some or all of the factual elements of the offense."[69] *Sanabria v. United States*, *United States v. Scott* and *Smalis v. Pennsylvania* all hold that an acquittal based on evidentiary insufficiency represents a resolution of the factual elements of the offense,[70] in contradistinction to a dismissal on mere procedural grounds.[71] Here, Smith repeatedly insisted on his right to submit the factual elements of the offense to the trial judge for such a resolution.[72] In response, the judge determined that government presented "not a scintilla of evidence" as to barrel length, an essential element of the crime.[73]

The Massachusetts Appeals Court proclaimed that the judge should be able to "correct" her resolution of the elements of the offense.[74] But it matters not whether a judgment of acquittal is based on a legal error: the acquittal is still final and preclusive.[75] For example, the trial

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[69] *Martin Linen*, 430 U.S. at 571 (emphasis added).

[70] *Sanabria*, 437 U.S. at 77; *Scott*, 437 U.S. at 97; *Smalis*, 476 U.S. at 144.

[71] *Scott*, 437 U.S. at 92.

[72] *Scott*, 437 U.S. at 96, 101; *contrast Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003).

[73] J.A. 21.

[74] J.A. 125-26.

[75] *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984); *Ex Parte Lange*, 85 U.S. 163, 174 (1873); *Sanabria*, 437 U.S. at 68-69 & n.22, 75; *Scott*, 437 U.S. at 98; *Smalis*, 476 U.S. at 144 n.7; *United States v. Sanges*, 144

(Continued on following page)

judge in *Sanabria* acquitted the defendant of participating in an illegal gambling business based solely on a legally erroneous defense-requested exclusion of the government's evidence.[76] Nevertheless, this Court concluded that the Double Jeopardy Clause prohibited revisiting the judgment of acquittal because it was "final and nonreviewable."[77] And in *Fong Foo v. United States*, the trial judge entered a judgment of acquittal "based upon an egregiously erroneous foundation."[78] Nevertheless, this Court held that " 'the verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy, and thereby violating the Constitution.' "[79] Thus, the trial judge's ruling, correct or not, constitutes a resolution of the elements of the offense and, as such, is protected as a final and preclusive acquittal by the Double Jeopardy Clause.

3. The judge unequivocally acquitted Smith.

The trial judge's ruling in Smith's case stands as a model of finality. After conducting a careful colloquy with the prosecutor regarding the sufficiency of the evidence, the judge responded to the prosecutor's arguments by saying,

> THE COURT: No, I don't think that there is a basis in which a jury, based upon Mr. Robinson's

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U.S. 310, 318 (1892); *United States v. Ball*, 163 U.S. 662, 669-670 (1896); *Kepner v. United States*, 195 U.S. 100, 126-130 (1904).

[76] *Sanabria*, 437 U.S. at 68-69.

[77] *Sanabria*, 437 U.S. at 77-78.

[78] *Fong Foo*, 369 U.S. at 143.

[79] *Fong Foo*, 369 U.S. at 143 (*quoting Ball*, 163 U.S. at 671).

> testimony alone, can conclude that a pistol or a revolver has a barrel length of sixteen inches or less.
>
> MR. PULEO: Well, given that, if that's the Court's interpretation of Mr. Robinson's testimony, then I will be requesting to reopen and allow Mr. Robinson to testify to that.
>
> THE COURT: Well, this is the time in which they are moving for a required finding of not guilty. *I'm going to allow it on the firearm charge*.[80]

Having no further evidence, the prosecutor then rested his case.[81] Leaving no room for doubt, the trial judge then took all of the necessary steps to convert her oral ruling into a final order. She first codified that ruling by making an endorsement – "11/12/98 – Filed and after hearing, Allowed. Donovan, J. Attest: Marybeth Brady Assistant Clerk" – on the motion itself.[82] This ruling was then entered on the official docket, which reflects the notation "11/12/98 Motion [for a required finding of not guilty] allowed after hearing."[83]

The order of acquittal might not have been final if it contemplated further argument.[84] But here, the judge demonstrably viewed her order of acquittal on the firearm charge as final. Witness her immediate rejection of the prosecutor's motion to reopen and her initiation of further

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[80] J.A. 21-22 (emphasis added).

[81] J.A. 22.

[82] (Endorsed Motion for Required Finding of Not Guilty); J.A. 98.

[83] J.A. 3.

[84] *See United States v. Jorn*, 400 U.S. 470, 478 n.7 (1971); *see also Lee*, 432 U.S. at 30.

proceedings on the remaining charges by requesting the defense to proceed with its case.[85] Indeed, the very structure of Rule 25 required this definitive ruling because it prohibits the trial judge from reserving a ruling on the motion.[86] The rule expressly states that if the motion is made at the close of the prosecution's case, "it shall be ruled upon at that time."[87] Therefore, both Smith and the government had every reason to expect that this acquittal stood as the final resolution of the firearm charge.[88]

This case thus stands in stark contrast to *Price v. Vincent*.[89] In *Vincent*, the trial judge voiced his "impression" that the lesser offense of second-degree murder was more "appropriate."[90] Moreover, the judge almost immediately agreed to hear further argument, suggesting that his ruling was not final.[91] Thus, this Court held that, for purposes of 28 U.S.C. § 2254(d)(1), it was not objectively unreasonable for the Michigan Supreme Court to decide that these comments were not sufficiently final to terminate jeopardy.[92]

In contrast, the trial judge's actions here bear all the indicia of "finality and clarity" that the *Vincent* Court noted were absent in *Vincent* and present in *Smalis* and

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[85] J.A. 22.

[86] Mass. R. Crim. P. 25(a).

[87] Mass. R. Crim. P. 25(a).

[88] *DiFrancesco*, 449 U.S. at 136, 139.

[89] *Price v. Vincent*, 538 U.S. 634 (2003).

[90] *Vincent*, 538 U.S. at 637.

[91] *Vincent*, 538 U.S. at 637.

[92] *Vincent*, 538 U.S. at 643.

United States v. Martin Linen.[93] The final and clear action in *Smalis* was merely the trial judge's ruling that "'the court was not satisfied . . . that there was sufficient evidence.'"[94] And in *Martin Linen*,

> [a]fter dismissal of the [deadlocked] jury, the District Judge advised counsel for all parties that he would be inclined "to enter a judgment of acquittal as to [the defendants] if an appropriate motion was made." He said that he had "almost instructed a verdict for all Defendants" because the Government's case "is without a doubt the weakest [contempt case that] I've ever seen."[95]

As in *Smalis* and *Martin Linen*, the trial judge here applied the appropriate standard, definitively ruled that the evidence was insufficient, and reduced the judgment of acquittal to a written order. Thus, the trial judge unequivocally acquitted Smith.

C. The Double Jeopardy Clause barred further proceedings after the judgment of acquittal.

Once the judge declared Smith to be not guilty of the firearm charge, jeopardy terminated and further proceedings on that charge violated the prohibition against double jeopardy.[96] Once jeopardy attaches, "there can be no appeal

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[93] *Vincent*, 538 U.S. at 640 (citing *Smalis*, 476 U.S. at 142; *Martin Linen*, 430 U.S. at 566).

[94] *Smalis*, 476 U.S. at 141-42 (*quoting* appendix to certiorari petition).

[95] *Martin Linen*, 430 U.S. at 566 n.3.

[96] *Smalis*, 476 U.S. at 145.

from, *or further prosecution after*, an acquittal."[97] This prohibition is not restricted to second trials. The Constitution protects acquitted defendants "not only when it might result in a second trial, *but also if reversal would translate into further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged*."[98] This is so whether the acquittal is by the court or by a jury: in either case, jeopardy irrevocably terminates.[99]

D. Smith was unlawfully subjected to additional factfinding proceedings on the firearm possession charge following his acquittal.

The further proceedings in Smith's case violated this Court's explicit and readily understandable standards recited above. The judge unequivocally found Smith to be not guilty.[100] Believing that the firearm charge was no longer before the court, Smith presented his case on the remaining charges through cross-examination of Patricia Brown, the mother of his codefendant.[101] He then rested his case and argued his requests for jury instructions. Only after all this did the

[97] *Serfass*, 420 U.S. at 392 (emphasis added, internal quotation marks omitted); *see also Burks v. United States*, 437 U.S. 1, 17 (1978); *see also United States v. Powell*, 469 U.S. 57, 65 (1984).

[98] *Smalis*, 476 U.S. at 146 (emphasis added, *quoting Martin Linen*, 430 U.S. at 570).

[99] *Fong Foo*, 369 U.S. at 143; *Martin Linen*, 430 U.S. at 573; *Sanabria*, 437 U.S. at 64 n.18; *Hudson*, 450 U.S. at 44-45, n.5; *Rumsey*, 467 U.S. at 210-212; *Smalis*, 476 U.S. at 145.

[100] J.A. 3, 21-22.

[101] J.A. 38-42, 56-59; J.A. 22.

judge "reverse" the already-granted acquittal. Immediately following that reversal, the jury proceeded to consider the facts on each element of the resurrected offense[102] and returned its specific finding of guilt.[103] These are additional "proceedings going to guilt or innocence."[104]

But this Court held in *United States v. Jenkins* and *Swisher v. Brady* that the Double Jeopardy Clause bars the making of supplemental findings following a true acquittal.[105] That is what happened in Smith's case. After the acquittal, the jury continued on to consider the defendant's case and factually determine whether they believed that the Commonwealth proved each element of the firearm charge beyond a reasonable doubt.[106] Under any reasonable definition of the phrase, the jury's deliberations constituted further factfinding proceedings going to guilt or innocence, barred by the prohibition against double jeopardy.

In order to distinguish this case from *Smalis* and *Martin Linen*, the government and the Massachusetts Appeals Court cling to the theory that no double jeopardy violation occurred in Smith's case because "the judge's correction of her ruling did not require a *second proceeding*" before a second trier of fact.[107] This is legal sleight-of-hand. *Smalis* established that the Double Jeopardy Clause

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[102] J.A. 77-79.

[103] J.A. 94-95; J.A. 102 (verdict slip).

[104] *Smalis*, 476 U.S. at 145.

[105] *United States v. Jenkins*, 420 U.S. 358, 370 (1975), overruled on other grounds, *Scott*, 437 U.S. at 86-87; *Brady*, 438 U.S. at 218.

[106] *In re Winship*, 397 U.S. 358, 361 (1970).

[107] J.A. 125 (emphasis added).

prohibits "subjecting the defendant to *post acquittal fact-finding proceedings* going to guilt or innocence" regardless of whether those proceedings literally constitute a second trial.[108] The Massachusetts Appeals Court avoided this edict by substituting the phrase "second proceeding" for "post acquittal factfinding proceedings" – a significant difference.

Contrary to the position of the Massachusetts Appeals Court, the scope of the protection against double jeopardy does not turn on the fortuity of how many counts a defendant faces. The status of jeopardy is determined offense by offense; if a defendant is acquitted of one charge, jeopardy terminates on that charge even if it continues for other charges in the trial or indictment. Adoption of the Massachusetts Appeals Court's standard would require this Court to overrule *Smalis v. Pennsylvania*. In *Smalis*,[109] the defendants were charged with seven offenses. The trial court acquitted the defendants on three counts at the close of the prosecution's case for insufficient evidence, with trial to continue on the remaining four.[110] The prosecution attempted to take a mid-trial appeal of the three acquittals, which this Court unanimously rejected. The Court held that "the trial judge's granting of petitioners' demurrer was an acquittal" terminating jeopardy on the three charges, and this acquittal could not be reversed because "reversal would have led to further trial proceedings" on those charges.[111] Even though reversal would have resulted

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[108] *Smalis*, 476 U.S. at 145 (emphasis added).

[109] *Smalis v. Pennsylvania*, 476 U.S. 140 (1986).

[110] *Commonwealth v. Smalis*, 480 A.2d 1046, 1048 & n.1 (Pa. Super. Ct. 1984).

[111] *Smalis*, 476 U.S. at 146.

in resumption of the *same* trial before the *same* finder of fact,[112] this Court nonetheless held that the resumption of proceedings after the trial judge's acquittal would violate the Double Jeopardy Clause.[113]

At the moment the trial judge was considering whether to reverse Smith's acquittal on the firearm possession charge, it stood in exactly the same position as the appellate courts in *Smalis*. While here it was a trial court rather than appellate court that contemplated reversing the acquittal, nothing turns on that distinction: the double jeopardy problem in *Smalis* was that proceedings on the acquitted charges would resume where they left off,[114] regardless of who was responsible for the resumption.

Smalis represents an unexceptional and direct extension of this Court's decision thirty years earlier in *Green v. United States*.[115] There, the Court expressly rejected the idea that "jeopardy on [the acquitted] charge continued until every offense alleged in the indictment had been finally adjudicated." This Court's opinion in *Price v. Georgia* reaffirms *Green* and leaves no room for mistake: jeopardy does not "continue" for acquitted offenses merely because proceedings continue on other offenses.[116] Rather, "a verdict of acquittal is final, ending a defendant's jeopardy."[117] Thus,

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[112] *Smalis*, 476 U.S. at 145.

[113] *Smalis*, 476 U.S. at 145.

[114] *Smalis*, 476 U.S. at 145-46.

[115] *Green v. United States*, 355 U.S. 184 (1957).

[116] *Price v. Georgia*, 398 U.S. 323, 329 (1970); *see Justices of the Boston Municipal Court v. Lydon*, 466 U.S. 294, 312 (1984); *cf. Breed v. Jones*, 421 U.S. 519, 534 (1975); *cf. Rumsey*, 467 U.S. at 210.

[117] *Green*, 355 U.S. at 188.

the trial judge's decision to send the firearm charge to the jury after acquittal placed Smith in jeopardy on that count a second time and thus violated the Double Jeopardy Clause.

The Massachusetts Appeals Court[118] and the United States in *Vincent* went wrong by mangling this Court's inapposite decision in *United States v. Wilson*.[119] *Wilson* holds that the Double Jeopardy Clause is not violated by a government appeal after a jury convicts the defendant but the judge *later* orders an acquittal because all that was required to correct the error was reinstatement of the verdict.[120] The key to *Wilson* was that no further factfinding proceedings ensued.[121]

By contrast, under the Appeals Court's newly-invented rubric, the judge's finding of not guilty meant nothing for purposes of double jeopardy because, by a mere fortuity, the jury remained to engage in factfinding on the *other* non-acquitted offenses. When this view was advanced by the United States as *amicus curiae* in *Vincent*, at least one Justice of this Court characterized the argument as "extraordinary."[122] Indeed, the ensuing opinion in *Vincent* does not cite *Wilson* at all. That is because *Wilson* simply does not apply. Where, as here, the *first* factual resolution of the case resulted in acquittal, then jeopardy

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[118] J.A. 125.

[119] *United States v. Wilson*, 420 U.S. 332 (1975).

[120] *Wilson*, 420 U.S. at 344-45.

[121] *Wilson*, 420 U.S. at 345.

[122] http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-524.pdf at 25 (visited December 29, 2003).

has terminated and the Double Jeopardy Clause bars further proceedings of any type.[123]

In addition to *Smalis*, this Court has rejected similar arguments that attempted to expand the *Wilson* rationale into the area of first-instance acquittals.[124] In *Arizona v. Rumsey*,[125] the jury convicted the defendant of armed robbery and first-degree murder. The trial judge was the sole trier of fact for Rumsey's subsequent death penalty sentencing hearing.[126] Due to a purely legal error, the trial judge rejected the death penalty and sentenced Rumsey to life in prison. Rumsey appealed and the government cross-appealed regarding the sentence.[127] The Arizona Supreme Court affirmed the conviction but remanded for a new sentencing hearing because of the trial judge's legal error.[128] The sentencing hearing on remand amounted to an appellate-court-ordered reconsideration of the prior ruling. No new evidence was presented at the resentencing; only legal arguments were heard before the same judge.[129] After reargument, the judge sentenced Rumsey to death.[130] Unmoved by the lack of new evidence, this Court held that the prohibition against double jeopardy barred

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[123] *Fong Foo v. United States*, 369 U.S. 141 (1962); *Smalis*, 476 U.S. at 145.

[124] *Jenkins*, 420 U.S. at 370; *United States v. Finch*, 433 U.S. 676, 677 (1977); *cf. Bullington v. Missouri*, 451 U.S. 430, 446 (1981); *Rumsey*, 467 U.S. at 211-212; *Smalis*, 476 U.S. at 145-46 & n.8.

[125] *Rumsey*, 467 U.S. at 211-212.

[126] *Rumsey*, 467 U.S. at 205; *but see Ring v. Arizona*, 536 U.S. 584 (2002).

[127] *Rumsey*, 467 U.S. at 206-207.

[128] *Rumsey*, 467 U.S. at 206-207.

[129] *Rumsey*, 467 U.S. at 207.

[130] *Rumsey*, 467 U.S. at 208.

any further proceedings[131] and reaffirmed its similar holding in *Bullington v. Missouri*.[132] So too, in Smith's case, the judge's unequivocal finding of not guilty barred further proceedings including "reconsideration" and submission of the firearm charge to the jury. Under *Rumsey*, the prohibition against such "reconsideration" applies regardless of whether either party presented additional evidence on that charge.

The Court also rejected this argument in *United States v. Jenkins*. Like the Appeals Court here, the Government argued in *Jenkins* that appeals of acquittals granted at the close of the prosecution's evidence are permissible because "if the appeal[s are] successful, any subsequent proceedings including, presumably, the reopening of the proceeding for the admission of additional evidence, would merely be a 'continuation of the first trial.'"[133] The Government also noted that, at least in a bench trial, the same judge could "reconvene the case, take up where he left off, and resume his duties as factfinder."[134] But the Court was "unable to accept the Government's contentions" and refused to endorse a concept of "continuing jeopardy" that permitted jeopardy to survive beyond a judicial acquittal, even in a case involving a single continuing trial before the same factfinder.[135]

The government may protest that reliance on *Jenkins* is precluded because *United States v. Scott* overruled

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[131] *Rumsey*, 467 U.S. at 211.

[132] *Bullington*, 451 U.S. at 446.

[133] *Jenkins*, 420 U.S. at 368-69.

[134] *Jenkins*, 420 U.S. at 369 n.13.

[135] *Jenkins*, 420 U.S. at 369.

Jenkins.[136] But this Court's unanimous opinion in *Smalis* put that argument to rest when it held that *Scott* "overrules *Jenkins* only insofar as *Jenkins* bars an appeal by the government when a defendant successfully moves for dismissal on a ground 'unrelated to factual guilt or innocence.'"[137] Rather than diminishing the force of *Jenkins*' holding, *Smalis* stands as a unanimous endorsement of *Jenkins*' underlying principle. The earlier cases of *Burks v. United States*[138] and *Sanabria v. United States*[139] also lead to the same conclusion reached in *Jenkins* and *Smalis*: once a judge (or panel of judges) truly acquits a defendant, the government is simply not permitted another attempt at conviction, regardless of the form of that attempt.

Indeed, where the *first* factual resolution results in a true acquittal, the Double Jeopardy Clause bars further proceedings of any type even proceedings requiring no further factfinding. This Court made as much clear in *United States v. Finch*.[140] There, the judge "dismissed" the information solely on legal grounds after a stipulated-facts trial. The government sought to appeal and the Ninth Circuit permitted the appeal on the theory now advanced by the Massachusetts Appeals Court: that, under *Wilson*, "no further factual proceedings would be required in the District Court in the event that its legal conclusions were found to be erroneous."[141] But this Court flatly rejected that theory. The Double Jeopardy Clause prohibited the

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[136] *Scott*, 437 U.S. at 86-87.

[137] *Smalis*, 476 U.S. at 146 n.9 (*quoting Scott*, 437 U.S. at 99).

[138] *Burks*, 437 U.S. at 16.

[139] *Sanabria*, 437 U.S. at 69, 77-78.

[140] *United States v. Finch*, 433 U.S. 676 (1977).

[141] *Finch*, 433 U.S. at 676.

government's appeal because, as in Smith's case, at the time the prosecution requested reconsideration of the acquittal, there was simply no guilty finding to reinstate.[142]

Here, after failing to convince the judge of the sufficiency of his case, the prosecutor scrambled for permission to "see if he cannot do better a second time"[143] with persuading a second factfinder: the jury. But there is no constitutional, statutory or common law power to "rehear" an acquittal.[144] Rehearing is barred because, in the words of this Court in *Burks*, "the purposes of the Clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple.' "[145]

E. The Massachusetts courts contravened this Court's settled precedent by requiring Smith to demonstrate prejudice from the violation of his right to be free from being placed twice in jeopardy.

In rejecting Smith's claim, the Massachusetts Appeals Court ruled that Smith "was not otherwise prejudiced by the [reconsideration of the] ruling."[146] That short turn of a phrase stands this Court's Double Jeopardy jurisprudence on its head. Like the complete denial of a defense, gauging the effect of a Double Jeopardy violation is an impossible

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[142] *Finch*, 433 U.S. at 677.

[143] *Brock v. North Carolina*, 344 U.S. 424, 429 (1953) (Frankfurter, J. concurring).

[144] *Sanges*, 144 U.S. at 315.

[145] *Burks*, 437 U.S. at 17.

[146] J.A. 127.

calculus.[147] Indeed, it is a calculus that is forbidden by the Constitution. "The public interest in the finality of criminal judgments is so strong that" where a defendant is twice placed in jeopardy, the Constitution "*conclusively presumes*" unfairness.[148] Indeed, in *Price v. Georgia*,[149] this Court explicitly rejected the suggestion that the harmless-beyond-a-reasonable standard[150] applies to double jeopardy violations. As the Court explained in *Burks*, analysis using the rubric of fairness or due process is simply beside the point because

> where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination.[151]

The Court firmly endorsed this rule in *Crist v. Bretz,*[152] decided on the same day as *Burks*. Thus, a defendant who has been placed twice in jeopardy is not required to make an additional showing of prejudice.[153]

In contrast, the Massachusetts Appeals Court's reasoning that the reconsideration of Smith's acquittal did not prejudice him relied on various considerations including:

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[147] *Jorn*, 400 U.S. at 483.

[148] *Brady*, 438 U.S. at 214 (emphasis added, *quoting Washington*, 434 U.S. at 503-505); *DiFrancesco*, 449 U.S. at 129.

[149] *Price*, 398 U.S. at 331.

[150] *See Chapman v. California*, 395 U.S. 250 (1969).

[151] *Burks*, 437 U.S. at 11 n.6; *DiFrancesco*, 449 U.S. at 131.

[152] *Bretz*, 437 U.S. at 37.

[153] *Illinois v. Somerville*, 410 U.S. 458, 471 (1973).

> The defendant has not suggested that the initial allowance of the motion affected his trial strategy with regard to the other charges. Moreover, the Commonwealth did not introduce any additional evidence, and the defendant was provided the opportunity to reopen his case. . . . The jury were not aware that the judge had allowed the motion and the correction of the ruling was made before closing arguments.

First, the transcript conclusively demonstrates that Smith was *not* "provided the opportunity to reopen" in the wake of the judge's reconsideration of Smith's acquittal. The record reveals no such offer. Following reconsideration, the record reveals only the judge's abrupt rejection of Smith's persistent attempts to argue additional grounds in support of his motion for a required finding of not guilty.[154] And given the judge's prior denial of the prosecution's motion to reopen,[155] there is no reason to think that she would have allowed Smith to reopen, much less suggest that Smith reopen. There is simply no basis in the record for the statement that Smith was "provided the opportunity to reopen." Second, the prosecutor did introduce additional evidence after the acquittal: he elicited evidence on cross-examination of Patricia Brown.[156] But even if its factual assertions were true, the Appeals Court's reasoning contradicts the settled law of double jeopardy.

The effect of the withdrawal of Smith's acquittal after the close of evidence and after the charge conference[157]

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[154] J.A. 75-76.

[155] J.A. 21-22.

[156] J.A. 42-55.

[157] J.A. 71.

demonstrates the wisdom of conclusively presuming unfairness rather than analyzing for prejudice where the Double Jeopardy Clause has been violated.[158] This is so because reconsideration of an acquittal after further proceedings deforms the adversarial process in real and identifiable ways. Here, it deprived Smith of important adversarial opportunities. The acquitted offense was no longer in issue when he presented his case.[159] So when the judge reconsidered after the close of Smith's case and the jury instruction conference, Smith lost even the opportunity to consider presenting evidence as to the length of the barrel of the firearm. In addition, the Massachusetts unlawful possession of a firearm statute exempts from its reach a person "present in or on his residence or place of business."[160] Smith lost the opportunity to consider presenting evidence as to his right to occupy the premises within that exception.[161] He did not have the opportunity to elicit evidence from Patricia Brown (Felicia Brown's mother and the owner of 33 Lawn Street) regarding Felicia's right to invite Smith to be a temporary resident of 33 Lawn Street. The issue is important, perhaps dispositive. Not long after Smith's trial, the Appeals Court reversed another defendant's conviction for unlawful possession of a firearm because the jury were improperly instructed on the "residence or place of business" exemption. In similar circumstances, the court reasoned that

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[158] *Brady*, 438 U.S. at 214; *Washington*, 434 U.S. at 503-505; *DiFrancesco*, 449 U.S. at 129.

[159] J.A. 38-42, 56-58.

[160] M.G.L. c. 269, § 10(a)(1).

[161] M.G.L. c. 269, § 10(a)(1).

> [p]roperly instructed, the jury could have found that [the defendant] Moore was within his residence for purposes of the exemption even if he shared the apartment with roommates, and even if [the defendant] possessed the gun in a roommate's bedroom.[162]

Smith's counsel attempted to argue this very ground but the judge cut him off.[163] Smith lost the opportunity to argue additional grounds for his motion for a required finding of not guilty.[164] And he lost the critical opportunity to ask the Court to instruct the jury on the firearm offense in line with his theories of defense.[165] Indeed, Smith could have argued for a "temporary resident" instruction because the evidence showed that he had been staying in Felicia's room at 33 Lawn Street for at least a week[166] and that the only place he was described as possessing the firearm was within Felicia's room.[167] Had he known that the firearm possession charge was still in the case, he could have asked for a temporary resident instruction.

Instead, Smith's counsel returned from the recess thinking that the firearm charge was no longer at issue. After the judge reconsidered Smith's acquittal, the case proceeded immediately to closing arguments with little or

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[162] *Commonwealth v. Moore*, 54 Mass. App. Ct. 334, 345-46, 765 N.E.2d 268, 277, rev. den. sub nom *Commonwealth v. Jones*, 437 Mass. 1102, 772 N.E.2d 588 (2002).

[163] J.A. 75-76.

[164] J.A. 75-76; *Herring v. New York*, 422 U.S. 853, 862 (1975).

[165] J.A. 59-71; *Rogers v. United States*, 422 U.S. 35, 38-40 (1975); *see United States v. Parent*, 954 F.2d 23, 26 (1st Cir. 1992).

[166] (Tr. 3:42, 56).

[167] (Tr. 2:67, 70).

no time for Smith's counsel to re-think his closing argument or request additional instructions.[168] The trial judge instructed the jury on the firearm possession offense without any input from the parties on those instructions whatsoever[169] and the jury then went off to deliberate. In short, counsel for Smith presented his entire case, participated in the jury charge conference, and prepared his closing argument all on the reasonable assumption that the gun possession charge was fully and finally resolved in Smith's favor – only to discover minutes before his closing argument that the firearm charge was back in the case.

So, like *Green*, the forfeiting of Smith's opportunity to defend against the firearm charge "enhanc[ed] the possibility that even though innocent, [the defendant] may be found guilty"[170] because a conviction upon a charge not tried (and not defended against) is fundamentally unfair.[171] Thus, the record in Smith's case affirms the wisdom of conclusively presuming unfairness when defendants are subjected to double jeopardy violations.

F. The policies embodied in the Double Jeopardy Clause favor the finality of a judgment of not guilty.

Among the "settled" policies underlying the Double Jeopardy Clause,[172] the "constitutional policy of finality for

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[168] J.A. 76.

[169] J.A. 77-79.

[170] *Green*, 355 U.S. at 187-88.

[171] *Cf. Jackson v. Virginia*, 443 U.S. 307, 314 (1979); *Cronic v. United States*, 466 U.S. 648 (1984).

[172] *DiFrancesco*, 449 U.S. at 127-132.

the defendant's benefit"[173] assumes particular importance in Smith's case. In *United States v. DiFrancesco*, this Court explained that finality is a primary concern of the Double Jeopardy Clause and that "[a]n acquittal is accorded special weight" within that framework of finality.[174] In the seminal modern case of *Fong Foo*, the Court put this emphasis on finality into effect: even an egregiously erroneous acquittal stands as a final, unreviewable judgment.[175] Over the past four decades, this Court has consistently reaffirmed that first-instance judgments of acquittal are non-appealable.[176] Respecting the Court's long-term commitment to this constitutional policy of finality, Smith consistently argued below, and argues here, that jeopardy barred further proceedings where the first factual resolution of the case after jeopardy attaches resulted in a true acquittal of the defendant.[177] Given the indisputably final nature of the judge's acquittal of Smith, proper respect for this primary policy behind the Double Jeopardy Clause requires that the judgment acquitting Smith be given final and conclusive effect.

Further, this Court has always emphasized the place of the Double Jeopardy Clause within our adversary system.[178] That system affords the government one, and

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[173] *Jorn*, 400 U.S. at 479.

[174] *DiFrancesco*, 449 U.S. at 128-130; *Tibbs v. Florida*, 457 U.S. 31, 41 & n.15 (1982).

[175] *Fong Foo*, 369 U.S. at 143.

[176] *See, e.g.*, *Martin Linen*, 430 U.S. at 571-572.

[177] *Martin Linen*, 430 U.S. at 574; J.A. 119 (reply brief in state court).

[178] *See, e.g., Oregon v. Kennedy*, 456 U.S. 667, 680 (1982) (Powell, J. concurring); *see Jorn*, 400 U.S. at 479; *see Scott*, 437 U.S. at 100; *Brock*,

(Continued on following page)

only one, attempt at obtaining a judgment against a criminal defendant. Once a final judgment is rendered, the government's role is complete regardless of alleged residual errors. In the words of Chief Justice Vinson,

> [o]rderly justice could not be secured if the rules allowed the defendant to ask for a mistrial at the conclusion of testimony just because the state had done well and the defense poorly. The same limitation applies to the prosecution if the scales of justice are to be kept in equal balance.[179]

Also relevant is the decision in *Sanabria*. There, the Court rejected the government's appeal of an acquittal entered by the trial judge based on an erroneous exclusion of evidence.[180] The government argued that because the defendant moved to dismiss the indictment, he waived his protection against double jeopardy.[181] This Court rejected that argument because

> [t]o hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor on a mid-trial motion leads to an acquittal would undercut the adversary assumption on which our system of criminal justice rests . . . and would vitiate one of the fundamental rights established by the Fifth Amendment.[182]

The government may argue that such a rule risks freeing the guilty. But as the Court observed in *Bullington*

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344 U.S. at 429, 432, 442 (concurring opinion of Frankfurter, J. and dissenting opinions of Vinson, C.J. and Douglas, J.).

[179] *Brock*, 344 U.S. at 432 (Vinson, C.J. dissenting).

[180] *Sanabria*, 437 U.S. at 78.

[181] *Sanabria*, 437 U.S. at 75.

[182] *Sanabria*, 437 U.S. at 78 (citation omitted).

v. Missouri¸ because the government must prove a defendant's guilt beyond a reasonable doubt, "it is the State, not the defendant, that should bear almost the entire risk of error."[183] The reason for this allocation of risk is explained by Friedland in his noted treatise on double jeopardy:

> An obvious result of the rule against double jeopardy is that occasionally guilty persons will escape punishment. But this is inevitable in any system of justice and one cannot tell in advance whether a particular accused is in that class. After most acquittals the police and the prosecutor probably still believe the accused to be guilty and in many of these cases could introduce some additional evidence of guilt. It is to the first trial, however, that their efforts should be directed.[184]

Thus our constitutional system allocates to the *government*, not the defendant, the risk of a prosecutor's incompetence or judge's error.

That rule properly respects the place of a defendant in our adversary system. If defendants know that any offense on which they obtain a directed verdict is still subject to further prosecution, they may simply lack the "stamina and resources" to continually fight off repeated motions for reconsideration. They may forego the right to trial and instead plead guilty upon encountering a prosecutor known to be persistent.[185]

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[183] *Bullington*, 451 U.S. at 446 (citation and internal quotation marks omitted).

[184] Friedland, Double Jeopardy 4 (1969).

[185] Friedland, Double Jeopardy 4 (1969).

Moreover, beyond the immediate facts of Smith's case, the implications of the Massachusetts Appeals Court threaten our adversarial system. Imagine that Smith stood trial for the firearm charge only. Upon the judge finding him not guilty, Smith and his counsel could have simply gone home. But, still present to hear the case against Smith's codefendant, the jury would have remained constituted exactly as it was at the beginning of Smith's trial. Under the Appeals Court's theory, a judge could later "reconsider" that acquittal and hail Smith back into Court merely "because the charge was submitted to the same jury that had heard the evidence"[186] prior to Smith's acquittal. This precise hypothetical, not at all farfetched, appeared to trouble this Court at oral argument in *Vincent*.[187]

Concern is warranted. Under the government's rationale, this Court could have remanded in *Smalis* and *Rumsey* to the same factfinder: the judge. If accepted, the Massachusetts Appeals Court's holding completely overrules both of these cases. If acquittals are to be so lacking in import for the final termination of jeopardy, nothing appears to prevent the government from devising a scheme of keeping a jury intact merely to enable a government appeal of a fully-litigated jury verdict of not guilty. If the jurors have not been discharged, the prosecution is free to try, try again. Chief Justice Vinson aptly

[186] J.A. 124.

[187] http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-524.pdf at 25 (visited December 29, 2003).

labeled similar tactics "stains upon the administration of justice."[188]

Further, under the Appeals Court's theory, a prosecutor could move for reconsideration of a bench-trial acquittal weeks after the acquittal. Armed with newly produced transcripts, better researched memoranda, and a well-practiced presentation, the prosecutor could seek the now-forbidden second bite at the apple. Reconsideration of the acquittal would only result in a continuation of the prior proceeding before the same finder of fact, so the Double Jeopardy Clause would afford the defendant no protection. Alternatively, the trial judge could resurrect a previously dismissed charge after the defendant had fully committed to presenting evidence responsive only to the remaining charges or, even worse, after the defendant has presented evidence helpful to the remaining charges but damaging to the resurrected one. A defendant's decisions regarding what evidence and arguments to present, whether and how to testify, what motions to make, and how to plead depend entirely on which charges remain at issue when the defense case is presented. The defendant cannot make these crucial decisions intelligently at the start of his case if there is always a chance that acquitted charges could pop back into existence at any time during – or even after – his presentation. The defendant must therefore remain in a heightened state of "anxiety and insecurity" throughout the trial, and "even though innocent he may be found guilty."[189]

[188] *Brock*, 344 U.S. at 434 (Vinson, C.J. dissenting) (*quoting In re Speir*, 12 N.C. 491, 493, 494, 498, 499, 502 (1828)); *see also Bretz*, 437 U.S. at 43 n.4 (Burger, C.J. dissenting).

[189] *Green*, 355 U.S. at 187-88.

CONCLUSION

This Court should reverse the judgment of the Massachusetts Appeals Court and remand to that court with directions to enter a judgment of not guilty of the firearm charge.

Respectfully submitted,

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